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ALEXANDER L. STEVAS
CLERK

No. 84-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DEAK-PERERA HAWAII, INC.,

Petitioner,

VS.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII, *et al.*,

Respondents,

AND

CITICORP (USA), INC.,

Respondent-Intervenor.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Hawaii, acting in its sovereign capacity, through its Department of Transportation, in operating all commercial airports in the state, is entitled to *Parker* state action immunity.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondents, State of Hawaii Department of Transportation, Ryokichi Higashionna, and Owen Miyamoto, respectfully pray that a Writ of Certiorari not issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

STATUTES INVOLVED

In addition to the constitutional and statutory provisions quoted by Petitioner in the Appendix to its Petition, the following statutes are set forth in the Appendix:

Hawaii Rev. Stat. § § 26-4, 26-19, 261-10, and 261-11

COUNTERSTATEMENT OF THE CASE

The issue in this case is whether the State of Hawaii, acting as sovereign, through a state executive department, in performing a legislatively directed governmental function, is entitled to *Parker* state action immunity.

This case arises from the valid exercise of statutory powers by officials of the State of Hawaii Department of Transportation in operating a self-sufficient, state-wide, state-owned commercial airport system. A complete statement of the facts of this case is set forth in Judge Pence's decision (553 F.Supp. 976). In order to properly frame the issues, however, the following uncontroverted facts are highlighted.

A. Factual Background

Since the inception of scheduled commercial airline service in Hawaii in the 1920's, all commercial airports have been operated by first, the Territory of Hawaii, and since 1959, the State of Hawaii. 553 F.Supp. at 978.

Under the Hawaii Constitution, the executive branch of the state government is limited to "not more than twenty principal departments" and each is "under the supervision of the governor. Art. V, Sec. 6. Enabling legislation provides for seventeen principal departments, including the State Department of Transportation ("DOT"), the principal respondent herein. Hawaii Rev. Stat. § 26-4. Also, DOT "shall establish, maintain and operate transportation facilities of

the State, including . . . airports . . ." Hawaii Rev. Stat. § 26-19.

DOT's powers relating to airports are contained in the Aeronautics Act of 1947, Hawaii Rev. Stat. Ch. 261. DOT is authorized to establish, operate, and maintain airports as well as facilities for the convenience of air travelers.[1] At the same time, DOT is required to "generate sufficient revenues from its airport properties to meet all of the expenditures of the statewide system of airports."[2] DOT is authorized to arrange for services to be furnished directly by it[3] or to enter into contracts or licenses "conferring the privilege" of supplying goods or services.[4] DOT is also authorized to "establish the terms and conditions" of the contracts or licenses as well as "fix charges ... or fees" for the privileges conferred "for the purpose of meeting the expenditures of the statewide system of airports."[5] Moreover, a ban on the grant of exclusive aircraft facility rights "shall not prevent the making of contracts, leases, and other arrangements pursuant to section 261-7."[6] Finally, operation of airports and the exercise of powers granted in the Aeronautics Act are "declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity."[7]

Given this legislative directive to establish, maintain, and operate a statewide commercial airport system, the further legislative command that the system be self-sufficient, and

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[1]Hawaii Rev. Stat. § 261-4(a).

[2]Hawaii Rev. Stat. § 261-5(a).

[3]Hawaii Rev. Stat. § 261-7(a)(3).

[4]Hawaii Rev. Stat. § 261-7(a)(2).

[5]Hawaii Rev. Stat. § 261-7(a).

[6]Hawaii Rev. Stat. § 261-10.

[7]Hawaii Rev. Stat. § 261-11.

the obviously finite amount of space available in the airport terminals, DOT has used exclusive concessions to provide a variety of goods and services to "air travelers," one of which is the foreign currency exchange. 553 F.Supp. at 978.

Since at least 1972, Petitioner, Deak-Perera Hawaii, Inc. ("Deak"), had run the foreign exchange concession under two successive five-year contracts. 553 F.Supp. at 978. With the contract due to expire on July 1, 1982, DOT took bids on a new five-year contract, and bids were opened on or about June 17, 1982. *Ibid.*,at n. 13. Respondent-intervenor, Citicorp (USA), Inc., bid $1.25 million while Deak bid only $505,000.

B. Proceedings Below

Having lost the bid, Deak filed suit on June 28, 1982, alleging violations of federal and Hawaii antitrust laws and seeking injunctive relief (CR. 1). Following a hearing on June 30, 1982, a temporary restraining order preventing the signing of the contract by the State and Citicorp was issued (CR. 10).

On August 24, 1982, Deak moved for partial summary judgment on the issue of state action immunity, claiming that the State was not entitled to *Parker* immunity (CR. 51). Both Deak and the State filed memoranda on the issue of *Parker* state action immunity, the State also claiming Tenth and Eleventh Amendment immunity (CR. 52). Following a hearing on September 1, 1982, Senior District Judge Martin Pence decided that the State defendants were entitled to *Parker* immunity, and granted the State's motion for summary judgment and denied Deak's motion. 553 F.Supp. 976.

Deak made a timely appeal to the Ninth Circuit. On October 26, 1984, the Ninth Circuit unanimously affirmed Judge Pence's decision. 745 F.2d 1281. On January 24, 1985,

ninety days after entry of judgment, Deak filed its petition for certiorari.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit Properly Applied The Antitrust Immunity Standards Established By This Court

It is important to recognize at the outset that neither the Ninth Circuit nor the District Court has conferred automatic or blanket immunity on the State, its officers or agencies solely or even partly because of their status.

Instead, the lower court held that when DOT and its officials act, exercising powers granted to them under the Hawaii Aeronautics Act, it is the same "as if the State of Hawaii were acting", and hence the acts of DOT are entitled to state action immunity "as the acts of the State of Hawaii as sovereign." 533 F.Supp. at 985.

The Ninth Circuit affirmed, holding that the DOT's action was an action of the State of Hawaii "acting as sovereign," and therefore entitled to immunity. 745 F.2d at 1282. Thus, the Ninth Circuit's decision was based not on the status of DOT, but rather on the fact that the challenged acts were done in a sovereign capacity pursuant to an express legislative directive to run the airport in a self-sufficient manner. Hence, such acts were immune as sovereign state action under *Parker v. Brown*, 317 U.S. 341 (1943).

In *Parker*, the Supreme Court unanimously upheld a legislatively authorized program against antitrust (and Commerce Clause) attack:

> We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to

> restrain a state or its officers or agents from activities directed by its legislature.

317 U.S. at 350-51. That statement is still true today since the progeny, if anything, have "reaffirmed the vitality of the *Parker* state action doctrine." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54 (1982).

As this Court stated most recently in *Hoover v. Ronwin*, 80 L.Ed.2d 590, 599, 603 (1984):

> [U]nder the Court's rationale in Parker, when a state legislature adopts legislation, its actions constitute those of the State, . . . and ipso facto are exempt from the operation of the anti trust laws.
>
> In the years since the decision in *Parker*, the Court has had occasion in several cases to determine the scope of the state action doctrine. It has never departed, however, from *Parker*'s basic reasoning.
>
> * * * * *
>
> The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if a sovereign acted wisely after full disclosure from its sovereign officers. The only requirement is that the action be that of "the State acting as sovereign."

Hence, the Ninth Circuit's decision that DOT's exercise of statutory powers are acts of the state as sovereign entitled to *Parker* immunity is in line with the rationale of *Parker* and its progeny.

Moreover, the Hawaii Legislature has given DOT broad powers to carry out the legislative mandate of operating a self-sufficient commercial airport system, and left it up to DOT officials to decide how to best serve changing passenger needs, what goods or services to offer, and whether

this should be done directly by DOT employees or indirectly by exclusive contracts. DOT need not point to "specific, detailed legislative authorization", *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978), and as a "sovereign state representative," need not show a "clearly articulated and affirmatively expressed state policy" *Hoover*, 80 L.Ed.2d at 600. Instead, the challenged actions were clearly "acts of the state as sovereign", and the Ninth Circuit correctly held that DOT was entitled to *Parker* immunity.

II. The Ninth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits

In this case, the Hawaii Legislature, not the courts, has conferred certain powers on DOT and made their exercise "governmental functions." Ignoring this clear legislative action, however, Deak claims that there is neither express authority nor active supervision in this case. Deak implicitly contends that the "two-prong" test enunciated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), is applicable to the actions of all antitrust defendants, whether state, local, or private.

Such an argument may have been appropriate several years ago when it was unclear whether *Midcal* was applicable to all defendants or just to private parties who were seeking to wrap themselves in "the gauzy cloak of state involvement." Since then, however, *Boulder* and *Hoover* have cleared up the confusion: the full force of *Midcal* applies only where private action is being challenged, the *Boulder* test is applicable when the challenged acts are those of a political subdivision, and sovereign state actions are still immune under *Parker*.

Other circuits have recognized that *Midcal* properly applies only to private parties claiming *Parker* immunity, and

that the *Midcal* test is inappropriate where "local action" of political subdivisions is involved. *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805, 809 (10th Cir. 1982), *cert. denied*, 459 U.S. 1126 (1983); *All American Cab Co. v. Metropolitan Knoxville Airport Authority*, 547 F.Supp. 509, 511 (E.D. Tenn. 1982), *aff'd mem.*, 723 F.2d 908 (6th Cir. 1983); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 384-85 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (June 11, 1984) (82-1832); *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3039 (July 25, 1983) (83-138); *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 428 (8th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3441 (November 18, 1983)(83-825).

In contrast, the instant case involves the actions of a state[8] acting as sovereign rather than local governmental action. Deak fails to appreciate that critical distinction, contending instead that state agencies and departments (and by implication their "state actions") are analogous to cities. Thus, Deak's reliance on *Lafayette* and *Boulder*.

Deak's argument ignores completely the fact that states and cities (and their departments) are *not* the same or even analogous. This Court pointed out in *Lafayette*, 435 U.S. at 412, and again in *Boulder*, 455 U.S. at 50, that this is a nation of states rather than city-states, and that under the constitutional principle of federalism, only the federal and state governments are sovereign. Hence, Mr. Justice Bren-

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[8]The only case factually similar to Deak is *Ajax Aluminum, Inc. v. Goodwill Industries of Muskegon County*, 564 F.Supp. 628 (W.D.Mich. 1983). Like the district court in *Deak*, the court in *Ajax* concluded that the Michigan Department of Labor (and its private contractor) was a sovereign entity acting as the sovereign, and therefore entitled to *Parker* immunity. 564 F.Supp at 633.

nan's use of the term "limited state sovereignty" to indicate that sovereignty does not extend to *political* subdivisions such as municipalities (*Lafayette*) or even home-rule cities (*Boulder*).

In those instances when a state legislature has authorized a state executive department to act, such action is clearly entitled to *Parker* immunity as "state action," and the *Boulder* test for "local action" and the *Midcal* test for "private action" are inappropriate. The Ninth Circuit's decision in this case is therefore in line with those of other circuits which have rejected blanket application of the *Midcal* test to all antitrust defendants. Accordingly, there is no conflict among the circuits on this point such as would require review of this case by this Court.

III. The Lower Courts Are In Accord on the Applicable State Action Immunity Tests

Lower federal courts before and since[9] the *Midcal* decision have distinguished between state, local, and private action and have applied the appropriate test:

State action. The New Jersey Supreme Court's Advisory Committee on Professional Ethics was immune under *Parker* in *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978). The same result would occur today under *Bates v. State Bar of*

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[9]Immediately after *Midcal*, some courts believed, like Deak, that *Midcal* was to be applied to all defendants. For example, although the district court apparently held the Pennsylvania Horse Racing Commission, ostensibly a state agency, acting under broad statutory authority, immune under *Parker* in *Euster v. Eagle Downs Racing Association*, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982), the circuit court affirmed on the basis of *Midcal*. *See also* the pre-*Boulder* decision, *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981), in which an exclusive municipal contract was tested under *Midcal*.

Arizona, 433 U.S. 350 (1977), and *Hoover*. *Accord, Feldman v. Gardner*, 661 F.2d 1295, 1306 (D.C.Cir. 1981), *cert. denied sub nom., Feldman v. District of Columbia Court of Appeals*, 458 U.S. 1106 (1982).

Local action. In *E.W. Wiggins v. Massachusetts Port Authority*, 362 F.2d 52, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966), the exclusive fixed base operator contract awarded by MassPort was immune since the acts were done in the exercise of a valid governmental function; the same result would occur today under *Boulder*. Similarly, under Boulder, the city, MAST, and the contractor were immune in *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3039 (July 25, 1983).

Private action. In *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), the city's antitrust claims against a private utility company were properly tested under *Midcal*.

Rather than being in disarray, these cases cited by Deak show that lower federal courts, especially since *Boulder*, understand the limitations of *Parker*: where local governmental action is challenged, it must be tested under *Boulder*, while essentially private action must be tested under *Midcal*.

Neither *Boulder* nor *Midcal* provides an appropriate test where the challenged acts are clearly those of a "sovereign state representative," such as the Hawaii Department of Transportation (and its officials), acting pursuant to a statute, such as Hawaii Rev. Stat. Sec. 261-11, which expressly makes the exercise of the granted powers "public and governmental functions." Instead, the proper test in that case is whether the challenged actions are those of the state in its sovereign capacity. And when the courts, as in this case,

have no doubt that the challenged actions are the acts of the sovereign, *Parker* applies.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be DENIED.

DATED: Honolulu, Hawaii, March 1, 1985

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APPENDIX

HAWAII REV. STAT.

§ 26-4 Structure of government. Under the supervision of the governor, all executive and administrative offices, departments, and instrumentalities of the state government and their respective functions, powers, and duties shall be allocated among and within the following principal departments which are hereby established:

(1) Department of personnel services (Section 26-5)
(2) Department of accounting and general services (Section 26-6)
(3) Department of the attorney general (Section 26-7)
(4) Department of budget and finance (Section 26-8)
(5) Department of commerce and consumer affairs (Section 26-9)
(6) Department of taxation (Section 26-10)
(7) University of Hawaii (Section 26-11)
(8) Department of education (Section 26-12)
(9) Department of health (Section 26-13)
(10) Department of social services and housing (Section 26-14)
(11) Department of land and natural resources (Section 26-15)
(12) Department of agriculture (Section 26-16)
(13) Department of Hawaiian home lands (Section 26-17)
(14) Department of planning and economic development (Section 26-18)
(15) Department of transportation (Section 26-19)
(16) Department of labor and industrial relations (Section 26-20)
(17) Department of defense (Section 26-21) [L Sp 1959 2d, c 1, § 3; am L 1961, c 132, § 1(a); am L 1963, c 2,

§ 1 and c 114, §§ 2, 4; Supp, § 14A-1; HRS § 26-4; am L 1970, c 105, § 4, am L 1982, c 204, § 8]

HAWAII REV. STAT.

§ 26-19 Department of transportation. The department of transportation shall be headed by a single executive to be known as the director of transportation.

The department shall establish, maintain, and operate transportation facilities of the State, including highways, airports, harbors, and such other transportation facilities and activities as may be authorized by law.

The department shall develop and promote ridesharing programs which shall include but not be limited to, carpool and vanpool programs, and may assist organizations interested in promoting similar programs, and arrange for contracts with private organizations to manage and operate these programs. Ridesharing programs include informal arrangements in which three or more persons ride together in a motor vehicle for four or more days a week to or from work or school.

The functions and authority heretofore exercised by the department of public works with respect to highways are transferred to the department of transportation established by this chapter.

On July 1, 1961, the Hawaii aeronautics commission, the board of harbor commissioners and the highway commission shall be abolished and their remaining functions, duties, and powers shall be transferred to the department of transportation.

Upon the abolishment of the Hawaii aeronautics commission, the board of harbor commissioners, and the highway commission, there shall be established within the depart-

ment of transportation a commission to be known as the commission on transportation which shall sit in an advisory capacity to the director of transportation on matters within the jurisdiction of the department of transportation. The commission on transportation shall consist of not more than eleven members, with the number of members from each county insofar as practicable being approximately proportional to the population of the respective counties to the population of the State; provided that each of the four counties shall be represented by at least one member. [L Sp 1959 2d, c 1, § 26; Supp, § 14A-25; HRS § 26-19; am L 1980, c 220, §§ 1, 2; am L 1981, c 140, § 1; am L 1983, c 43, § 1; am L 1984, c 233, § 1]

HAWAII REV. STAT.

§ 261-10 Exclusive rights prohibited. The department of transportation shall grant no exclusive right for the use of an airway, landing area, or air navigation facility under its jurisdiction. This section shall not prevent the making of contracts, leases, and other arrangements pursuant to section 261-7. [L 1947, c 32, pt of § 1; RL 1955, § 15-16; am L Sp 1959, 2d, c 1, § 26]

HAWAII REV. STAT.

§ 261-11 Public purpose of activities. The acquisition of any lands or interests therein pursuant to this chapter, the planning, acquisition, establishment, construction, improvement, maintenance, equipment, and operation of airports and air navigation facilities; and the exercise of any other powers granted by this chapter to the department of transportation are declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity. All lands and other property and privileges acquired and used by or on behalf of the State in the manner and for the purposes enumerated in this chapter shall and are declared to be acquired and used for public and governmental purposes and as a matter of public necessity. [L 1947, c 32, pt of § 1; RL 1955, § 15-17; am L Sp 1959 2d, c 1, § 26]